

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 02-376-A
)	
DENIS RIVERA,)	
a/k/a "Conejo")	
NOE RAMIREZ-GUARDADO,)	
a/k/a "Tricky")	
LUIS ALBERTO CARTAGENA,)	
a/k/a "Scuby")	
Defendants.)	
)	

GOVERNMENT'S RULE 404(b) NOTICE

COMES NOW the United States of America by its United States Attorney for the Eastern District of Virginia, Paul J. McNulty, and Ronald L. Walutes, Jr., Michael E. Rich and Patrick F. Stokes, Assistant United States Attorneys, and respectfully files this Rule 404(b) Notice:

1. On Sunday evening, September 16, 2001, Denis Rivera and a former co-defendant, Andy Salinas, met the twenty year old victim, Joaquin Diaz, at the McDonald's Restaurant located in the 1400 block of North Beauregard Street in Alexandria, Virginia. The surveillance tape of that evening places all three men inside the restaurant. Shortly thereafter the victim followed the two MS-13 members to the gang's hang out in the Woodmont apartment complex in the 5500 block of North Morgan Street, Alexandria. There, after first sharing marijuana with their victim, the assembled MS-13 members persuaded Diaz to get into a car ostensibly to go to purchase additional marijuana. A second car carrying additional members departed separately to participate in this murder. The cars stopped at Daingerfield Island, which is United States Park land immediately adjacent to the George Washington Memorial Parkway just south of Reagan National Airport and north of Old Town

Alexandria. The gang members persuaded their victim to exit the car and join them in searching for other MS-13 members in the woods.

2. Once in the woods, the defendants set upon Diaz with knives, stabbing him numerous times and leaving him dead in the park. The victim suffered numerous defensive wounds on his hands and arms, and numerous stab wounds to his back, chest (one of which struck his heart), face and throat. His head was very nearly severed and his esophagus was excised and located on the path near his body. The medical examiner believes the victim would have lived through these wounds until his throat was removed by what appears to have been a household steak knife. The surveillance tape from the McDonald's camera includes both the time and date that the two MS-13 members first meet with the victim (September 16, 2001 shortly after 7 p.m.) and the Report of Investigation by Medical Examiner puts the time of death as the day before the examination, or sometime during the evening of September 16, 2001.

3. On July 9, 2003, the defendants, Denis Rivera, also known as "Conejo," Noe David Ramirez-Guardado, also known as "Tricky," and Luis Alberto Cartagena, also known as "Scuby," were arraigned on a two-count indictment charging them with Conspiracy to Commit Murder in violation of Title 18, United States Code, Section 1117 and Murder in violation of Title 18, United States Code, Section 2 and 1111. On April 30, 2003, the defendant, Rivera, filed a discovery motion with this Court seeking thirty days notice of any Rule 404(b) evidence. Defendant Ramirez-Guardado subsequently joined this discovery request. The trial in this matter is presently scheduled for September 16, 2003. The Court, by order dated July 9, 2003, granted the defendant's request for thirty days notice and directed that the government file any Rule 404(b) notices by August 15, 2003.

4. The evidence identified in this notice is directly relevant to each respective defendants' consciousness of guilt and is admissible without resort to Rule 404(b). It is self evident that someone accused of a crime does not 1) plot to escape by killing deputy sheriffs, 2) carefully communicate with others to rehearse and coordinate false testimony or 3) intimidate and kill witnesses unless they appreciate their guilt of the charged offenses. Evidence of this conduct therefore is direct evidence of the defendant's consciousness of guilt. Similarly, evidence that the defendant continues to conduct gang affairs from inside the jail is direct evidence of his membership in MS-13. Where evidence points to a defendant's consciousness of guilt, such evidence is admissible if "it is both related to the offense charged and reliable." United States v. Young, 248 F.3d 260, 272 (4th Cir. 2001). Evidence of consciousness of guilt "indicates '[defendant's] consciousness that his case is a weak or unfounded one; **and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit.**" United States v. Van Metre, 150 F.3d 339, 352 (4th Cir. 1998). However, out of an abundance of caution, the government has separately included this evidence within this Rule 404(b) notice, providing a second, independent basis for the admission of this evidence in the government's case-in-chief.

5. Rule 404(b) permits the admission of other crimes evidence "as proof of motive, . . . intent, preparation, plan, knowledge, identity, or absence of mistake or accident" Fed. R. Evid. 404(b). Rule 404(b) is viewed as "an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." United States v. Young, 248 F.3d 260, 271-72 (4th Cir. 2001) ("evidence of witness intimidation is admissible to prove consciousness of guilt...because [the threats against a witness] establish a defendant's 'consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's

lack of truth and merit.”) (citations omitted). The circumstances under which evidence may be found admissible under Rule 404(b) have been described as ‘infinite.’” United States v. Masters, 622 F.2d 83,86 (4th Cir. 1980).

DEFENDANT RIVERA’S ESCAPE PLANS

6. Evidence of consciousness of guilt is admissible as Rule 404(b) if related to the charged offense and reliable. United States v. Young, 248 F.3d 260, 272 (4th Cir. 2001). “Evidence of flight or escape may be admissible to prove a defendant’s consciousness of guilt, consistent with Rule 404(b).” United States v. Bartelho, 129 F.3d 663, 677 (1st Cir. 1997). See also United States v. Obi, 239 F.3d 662 (4th Cir. 2001)(“It can not be doubted that in appropriate circumstances, a consciousness of guilt may be deduced from evidence of flight...‘the innocent man is [without consciousness of guilt]; the guilty man usually has it.’); United States v. Jones, 238 F.3d 416 (4th Cir. 2000) (Evidence of defendant’s escape from jail while awaiting trial on armed robbery charges admitted as evidence of defendant’s consciousness of guilt.); Unites States v. Paige, 324 F.2d 31 (4th Cir. 1963)) (flight may, of course, be taken to evince a defendant’s “consciousness of guilt.”). In Bartelho the defendant was incarcerated on robbery charges when plans of his escape from prison were discovered. The court found the escape plans were evidence of the defendant’s consciousness of guilt. Furthermore such evidence was relevant because at the time the defendant had planned the escape the defendant’s incarceration was related to the robbery charges against him. In Obi the Fourth Circuit noted that “[t]o establish [the] causal chain, there must be evidence that the defendant fled or attempted to flee and that that supports inferences that (1) the defendant’s flight was the product of consciousness of guilt, and (2) his consciousness of guilt was in relation to the crime with which he was ultimately charged and on which th evidence is offered. Obi at 665.

7. Like Bartelho, the evidence involves a planned escape before trial. Although the defendant has other pending state charges in addition to the instant federal offense, he appreciates the significance of the federal case relative to his various state offenses. Defendant Rivera, in a letter to his codefendant and the local leader of MS-13,¹ writes “I also have a lot of charges (lamenting the various state charges each then had pending) but the most important is the one of the worm [Diaz] of the U.S. Marshal.” Attachment A.² He further explains that although an Arlington County jury gave him a four and one half year sentence, he did not expect to receive significant additional time. “. . . I lost and they gave me 4 years and a half in Londo. I still have to go to ruling for another case from 2 to 10 years, but it alright, I don’t think they are going to give me more time. But of all this time I just have 3 more years to go.”³ Defendant Rivera’s original plan was to escape while transferred to the Fairfax County Detention Facility for a scheduled court appearance before the Fairfax County Circuit Court on May 23, 2003. After learning that law enforcement had uncovered

¹The defendant Rivera’s own recorded debriefing with Arlington County includes admissions on March 28, 2003, that Rivera is a big MS person on the street and a leader of a clique, and on April 4, 2003, Rivera notes that Tricky will once again be the leader when he gets out of jail.

²This letter was previously disclosed to defense counsel in a government pleading filed July 1, 2003, entitled Government’s Opposition to Defendant’s Motion to Reconsider Discovery Rulings. On July 4, 2003, defendant Rivera is recorded speaking to a Michelle [Pending official translation, the government is using law enforcement generated translations and is therefore omitting quotation marks at this stage]. **Defendant Rivera:** Tell Tricky that my lawyers showed me some letters of his. Tell him to be careful and tear up the letters because I think the cops that work there [Fairfax County Detention Facility] are working with that bitch Detective Victor [Ignacio, Alexandria City Police Department].

³Of course, the defendant’s prediction proved inaccurate, in part because the state revealed to the Arlington County Circuit Court evidence of the defendant’s planned escape and intention to harm an Arlington County or Fairfax County Deputy Sheriff during a May 23, 2003, transfer to Fairfax County for a criminal court appearance there. The relevant fact, for purposes of the Rule 404(b) analysis is this defendant’s state of mind at the time of his planned escape, and from this letter it is clear he is focused upon the federal offense.

that escape plan, defendant Rivera planned a second escape attempt, again during another transfer to the Fairfax County Detention Facility on July 22, 2003.⁴ In another letter, defendant Rivera writes “...I already got four and Half years for a case here in Arlington, I shot myself [plead guilty] and I thought that they were going to drop more years on me. The problems are not over in this county, I go to another sentencing but I’m sure that I’m not going to get anymore time. The other problems is when I was a juvenile, but they threw at me as an adult. **The most important problem ESE is that of the murder**” Attachment B (pending court certified translation).

8. Finally, like Bartelho, the evidence pertaining to Rivera’s escape plan is reliable. This evidence includes: 1) witnesses that will testify as to his plan, 2) telephone calls made under another released Arlington County Detention Facility inmate’s PIN number in Spanish and often in slang and code to girlfriends to identify whether they might be at home on the day of his planned escape, 3) telephone calls made under the same PIN number to other co-conspirators also in Spanish, slang and code regarding the planned escape⁵ and 4) maps drawn by the defendant regarding the actual escape

⁴Defendant Rivera plead guilty through an Alford plea to his pending charges at this appearance and agreed to a sentence of nine years incarceration. This further demonstrates that the efforts to escape were directed at the pending federal charges, the defendant having plead guilty to his state criminal charges in the City of Alexandria, Arlington County and now Fairfax County.

⁵Recorded telephone conversation between defendant Rivera and juvenile J.L., also known as Johnny and the “Philosopher” on May 21, 2003. The Arlington County Detention Facility posts written notices that telephone calls from the jail may be monitored and recorded and every telephone call includes a warning repeating that all calls may be monitored and recorded. This translation is produced from the Federal Bureau of Investigation’s translation unit and is pending review by a Court Certified Translator. **Philosopher:** Somebody ratted about that * * * * They say that they have it on tape. **Defendant Rivera:** Oh yeah? **Philosopher:** Ah ha. **Defendant Rivera:** A serious problem? **Philosopher:** Yeah....They talked with my father. * * * * **Defendant Rivera:** Yeah. **Philosopher:** . . . It’s a serious problem. **Defendant Rivera:** A serious problem, hom. **Philosopher:** Do you know who it is?... **Defendant Rivera:** Who? **Philosopher:** The one that ratted? **Defendant Rivera:** Yes. **Philosopher:** Serious problem. **Defendant Rivera:** Yes, I know who it was. . . . **Defendant Rivera:** But how, how did it happen, what did they tell you? **Philosopher:** That I was

found in Rivera's cell. Accordingly, defendant Rivera's plans to escape from incarceration are properly admitted pursuant to Rule 404(b) as evidence of his consciousness of guilt regarding the Federal murder charges against him.

WITNESS INTIMIDATION AND SUBORNING FALSE TESTIMONY

9. Like evidence of a planned escape, "[e]vidence of witness intimidation is admissible to prove consciousness of guilt and criminal intent under Rule 404(b), if the evidence (1) is related to

returning from Houston with the home boys. **Defendant Rivera:** Who? **Philosopher:** Me. Supposedly. . . . [Detective] Victor [Ignacio of the Alexandria City Police Department's Gang Unit] already knew. * * * * He already knew that I was coming here. * * * * he knows everything, Victor. **Defendant Rivera:** Yeah, they already know about the job, ah? **Philosopher:** Yes, my father clearly knows everything. **Defendant Rivera:** What do you mean, clearly? **Philosopher:** That we were planning it, that it was going to be this week. . . . That we were coming with some home boys and that we were going to put (unintelligible) all the police and we were going to grab you. **Defendant Rivera:** Ah ha. **Philosopher:** Or if we are going to see, we are looking at another way of doing it. * * * * It's like he has it on tape. **Defendant Rivera:** He has it on tape? **Philosopher:** Yes. **Defendant Rivera:** Don't you (unintelligible) because they always tell you that, hom. . . . no they can't tap the phones just like that. **Philosopher:** Yeah. **Defendant Rivera:** It's forbidden to hear one's conversations. **Philosopher:** Yeah! It's forbidden. (Laughs). * * * * Victor told my father. * * * * **Defendant Rivera:** About what? **Philosopher:** About everything. . . . About everything, how we were going to do that. How some home boys were going to come. . . like he grabbed it. . . **Defendant Rivera:** No, they are just making things up, hom. They don't know how it's going to be. They just know when it's going to happen, but they don't know how it will be.

Recorded telephone conversation (FBI translation) between defendant Rivera and the "Philosopher" on May 21, 2003, at 11:49 a.m. **Philosopher:** But if they should grab me, don't worry about it....**Defendant Rivera:** No it's that....**Philosopher:** I'm not going to tell them anything. **Defendant Rivera:** Home boy! **Philosopher:** What? **Defendant Rivera:** The cops already know, that's no problem. The thing is that we have to deny it.

Recorded telephone conversation between defendant Rivera and the "Philosopher" on June 16, 2003 at 9:43 p.m. This translation is by a Spanish speaking officer of the United States Park Police and is pending review by a Court Certified Translator. **Defendant Rivera:** I'm going to do it in Fairfax. They even took me outside. They just had me cuffed in the rear. It was just some little old bitches [guards]. They weren't even wearing body [armor], homs. **Philosopher:** Now I understand what you want to do. **Defendant Rivera:** All I need is someone with a rifle, homes. Right there on 66. I can give you the address of where you need to be. There are some buildings right next door. **Philosopher:** Yes, we need to plan it well. **Defendant Rivera:** Don't tell anyone about this homs.

the offense charged and (2) is reliable.” United States v. Hayden 85 F.3d 153, 159 (4th Cir 1996); United States v. Young, 248 F.3d 260, 272 (4th Cir. 2001); United States v. Van Metre, 150 F.3d 339, 352 (4th Cir. 1998)(“a defendant’s attempt to threaten an adverse witness indicates ‘his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause’s lack of truth and merit’”). In Hayden, the court held that a telephone call was properly admitted even though the caller never said his name because the witness was able to identify the caller’s voice as that of the defendant. Id. The court further held that although no handwriting analysis was conducted on the letter, no fingerprints on the letter, and the letter was not signed, the letter was still reliable because its content “pointed” to the defendant as the author and the recipient of the letter was able to “establish the identity of the writer of the letter to a fairly reliable degree.” Id. at 159.⁶ Finally the court in Hayden ruled that the 404(b) evidence passed a 403 balancing test because the probative value of the letter and the telephone threats were great due to the fact that “the threats went directly to establish criminal intent and guilty conscience.”

10. Like the defendant in Hayden, Rivera and Ramirez-Guardado have written letters, directly communicated with and made phone calls to witnesses in an attempt to threaten and intimidate them either into no longer testifying at all or into testifying falsely. Some threats explicitly mention harm that will come to the witnesses. Other threats come in the form of requests – requests to subordinate members of MS-13, of which Rivera and Ramirez-Guardado are the senior members, greatly feared by the other gang members, to lie on the stand. Because of Rivera and Ramirez-Guardado’s status

⁶Of course, the evidence is much stronger in the present case, where the letters and maps were located in the defendants’ cells, are signed and the handwriting is easily identified, as well as the shared gang slogans and references, by witnesses who will be called at trial. In addition, the defendant’s written plans and verbal telephone conversations are consistent and further establish the reliability of the evidence.

in MS-13, and their reputations as utterly ruthless, these subordinates who have been contacted fully appreciate the dire consequences of any testimony favorable to the government. Finally there is evidence that at least Rivera has attempted to have other members of the MS-13 gang kill those witnesses that have agreed to cooperate with the government.

11. The evidence of explicit and implied threats via mail and telephone, the efforts suborn perjury and the evidence of attempting to kill government witnesses point to multiple attempts by Rivera and Ramirez-Guardado to intimidate witnesses and alter or eliminate testimony. All such evidence is evidence of Rivera and Ramirez-Guardado's consciousness of guilt and of their criminal intent. Furthermore such evidence is admissible as 404(b) evidence because it is both (1) related to the charged offense and (2) is reliable. The evidence of Rivera and Ramirez-Guardado's witness intimidation is directly related to the charged offense where these witnesses will testify in the government's case-in-chief. The evidence is reliable because like the letters in Hayden, the content of the letters to be introduced points directly to Rivera as the author.⁷ Further like the telephone

⁷Defendant Rivera sent letters to Andy Salinas, also known as "Lucifer" through other MS-13 members incarcerated in their respective jails (Arlington and Alexandria). Some of these letters were intercepted and are attached for the Court's review along with translations. Attachment C. The defendant Rivera appreciated the need to destroy his letters and took steps to share them with only trusted associates. For instance, Salinas – suspected by Rivera as considering a cooperation agreement with the government – was not permitted to hold the letters and at least one was destroyed and flushed in Salinas' toilet by the intermediary. Defendant Rivera uses a number of codes, sounds and symbols in these letters and telephone conversations, including: "earthworm" and "worm" for the decedent, Joaquin Diaz; "bullets" for years; "shoot yourself" for plead guilty; "rat" for snitch; an "X" superimposed over a name to indicate a green light to kill that witness.

In one letter, pending court certified translation, defendant Rivera tells Salinas: "All right, this is what you are going to say, 'cause this is the truth. You and I met outside the Giant and we greeted each other. I invited you to eat at the McDonald's and we went and we found the earthworm inside eating. We said hello to the earthworm and we placed our order. We sat, we ate and we talk. The earthworm left. We went out about 7 to 10 minutes after the earthworm. We greeted the fucking bitch from TC Williams with her boyfriend. Do you remember the bitch that drove the white car? All right, you ask the bitch for a cigarette and then we walked away and we saw the earthworm at

communications in Hayden the voice recorded in the telephone communications to be introduced is readily identifiable by multiple witnesses as Rivera's voice (in addition to the fact that Rivera is detained and is making these telephone calls from jail).⁸ Defendant Ramirez-Guardado similarly is seeking to obtain perjured testimony and threaten witnesses. The principal difference between the two co-defendants is that Rivera's communications are recorded and Ramirez-Guardado's conduct

the bus stop. The vato asked us where we were going. We told him that we were going to a homeboy. The earthworm asked us if we were heading down and we said yes. We walked up to the light with the earthworm. I told you that I was leaving and that I was going to visit my little boss, that it had been days since I last saw her, and I walked back up. You and the earthworm went down to homeboy's Filosofo's house and there were other vatos there that you did not know. You went inside of a homeboy's house and you got real crazy smoking and drinking. And then you don't know what happened. No more, just say that."

In another letter, defendant Rivera asks a MS-13 member "I want to ask you for a favor, because the bitch fag of Lucifer shit on my stick and the bitch rat Maldito is making deals with the FBI and he is no longer in Alexandria. * * * * Here I'm sending you another letter ESE and do me the favor and read it to him [Lucifer] and then tear it up and flushed down the toilet after you read it. If not you dump it after the little bitch fag is done reading it."

In another letter, defendant Rivera reports to Ramirez-Guardado (then not yet federally charged): "Oh, I have to tell you that the bitch, Maldito let escape the turtle. The bitch had panicked and has threw the rat. The guy is not in Alexandria anymore. I think they moved him to another county.... Watch it also the chicken of Lucifer...he shit on me. He wrote me and told me that and I passed it to all the homeboys of the barrio."

Telephone conversation (FBI translation) between Rivera and the philosopher on May 21, 2003: **Philosopher:** But wasn't Bracey was in love with a Lucifer? **Defendant Rivera:** That vermin is a rat, he ratted on me, hom. **Philosopher:** Oh yeah? **Defendant Rivera:** Yeah, he took the blame for the assassination....he pled guilty to first degree murder....It was in the news.

In another letter Rivera asks a MS-13 gang member locked up in Alexandria with Salinas, Rivera writes: "The bitch Chavala of V-LoCo made a deal to throw me the rat and he was only going to do three years for possession of a handgun and the chavala Chupon made a deal to do weekends only for ratting me out. Don't talk to those bitch homeboys Chupon homeboy but when you get out maybe you do me the favor to make him a zipper [cut/kill cooperating witness]. I will appreciate it. And if you can't get rid of that bitch fag Lucifer before you get out I would appreciate that favor."

⁸Defendant Rivera is speaking in Spanish, often using code words to obscure his message, and is using the PIN number of a former inmate who is no longer at the Arlington County detention facility to disguise his communications.

has not been recorded to the government's knowledge. Ramirez-Guardado, however, has run his finger across his throat to one witness whom he believed to be snitching and has attempted to alter testimony. Thus evidence of Rivera and Ramirez-Guardado's witness intimidation should be admitted under 404(b) as evidence of their consciousness of guilt and criminal intent.

THE PROFFERED EVIDENCE IS ADMISSIBLE IRRESPECTIVE OF WHETHER THE DEFENSE ELECTS TO CONTEST ANY PARTICULAR ELEMENT OF THE GOVERNMENT'S CASE AT TRIAL

12. Where intent is an element of the offense charged, the government need not wait for the defense to deny intent before it may introduce evidence of intent. United States v. Crowder, 141 F.3d 1202, 1205 n.1 (D.C. Cir. 1998). See also id. at 1210-1211 (Addendum discussing case law of the several Circuits). Crowder involved a situation where to prove the defendant's intentional participation in a drug sale, the government introduced prior drug sales under Rule 404 (b); the defense had sought to stipulate the issue of intent out of the case, while contesting only the element of identity. 141 F.3d at 1203-1205. The en banc panel of the District of Columbia Circuit affirmed the trial court's Rule 404 (b) rulings, making clear its view that, even where the defense offers to make an unequivocal stipulation to an element such as intent, the prosecution is not barred from proving up that element by admissible evidence, including Rule 404 (b) evidence:

. . . [W]e hold that a defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under Rule 404 (b) to prove that element, even if the defendant's proposed stipulation is unequivocal, and even if the defendant agrees to a jury instruction of the sort mentioned in our earlier opinion.

United States v. Crowder, supra, 141 F.2d at 1209. The Crowder panel relied heavily on the Supreme Court's decision in Old Chief v. United States, 519 U.S. 173 (1997). Old Chief carved out

a narrow exception to the rule that “the prosecution is entitled to prove its case free from any defendant’s option to stipulate the evidence away,” 519 U.S. at 186,⁹ while at the same time vigorously reaffirming the continued legitimacy of that rule in a lengthy discussion. See id. at 186-89.

Drawing from that discussion, Crowder emphasized the legitimacy and importance of Rule 404(b) evidence, especially concerning intent, and irrespective of whether the defense contests that issue:

. . . [A]ll nine justices in Old Chief agreed with “the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the government chooses to present it.”

. . . [E]very Justice disagreed with the notion that a stipulation has the same evidentiary value as the government’s proof. . .

. . . [T]he elements of intent and knowledge are the core of the offenses charged in the cases before us. Replacing proof of these elements with stipulations creates “a gap in the story of a defendant’s subsequent criminality.” To be sure, other crimes evidence will typically relate to events more or less removed in time from the charged offenses. But that is true of many other kinds of evidence. . . Evidence about what the defendant said or did at other times can be a critical part of the story of a crime, and may be introduced to prove what the defendant was thinking or doing at the time of the offense. . . Old Chief establishes that the prosecution cannot be forced to stipulate away the force of such evidence.

141 F.3d at 1207 (citations omitted). Cf. Estelle v. McGuire, 502 U.S. 62, 69-70 (1991) (rejecting habeas attack on state homicide conviction, where intent evidence included defendant’s prior battering of child-decedent; the Court reasoned, “the prosecution’s burden to prove every element of the crime is not relieved by a defendant’s tactical decision not to contest an essential element of the

⁹ The exception was for proving a defendant’s status as a “felon,” in possession of a firearm, 18 U.S.C. § 922(g)(1).

offense. In the federal courts, “[a] simple plea of not guilty . . . puts the prosecution to its proof as to allelements of the crime charged.” (citation omitted); United States v. Johnson, 40 F.3d 436, 441 n.3 (D.C. Cir. 1994) (“[T]he government may still introduce evidence to establish each of the elements of an offense, even those elements tactically ceded by a defendant.”).

13. The government submits that all the foregoing concerns are only heightened where the intent element relates to homicide. Courts have been sensitive to the government’s need to utilize extrinsic evidence to establish a defendant’s intent. “On the issue of intent, which is far harder to prove by extrinsic evidence than [the defendant]’s identity or the falsity of the statements, the government’s need for [Rule 404(b)] evidence is correspondingly greater.” United States v. DeLoach, 654 F.2d 763, 769 (D.C. Cir. 1980), cert. denied, 450 U.S. 973 (1981). The Supreme Court has interpreted Rule 404(b) to mean “that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.” Huddleston v. United States, 485 U.S. 681, 685 (1988). Here the decedent was killed to prove that the defendants and their gang were capable of murder. The crime is punishable by a mandatory life sentence. Realistically, the defendants appreciate that subsequent prosecutions for witness tampering, 18 U.S.C. § 1512 (where death does not result), or escape, 18 U.S.C. 751, cannot lengthen their sentences. There are very strong public policy reasons supporting the admission of the evidence proffered by the government. Properly admissible evidence should be permitted in the context of a case where the defendants essentially have nothing to lose from such horrific behavior. The law should not and does not shield them from their conduct, committed solely because of their

consciousness of guilt, whether it be orchestrating false testimony, silencing witness testimony or planning escapes to avoid the accountability that comes with a trial.¹⁰

THE PROBATIVE VALUE OF THE PROFFERED RULE 404(b) EVIDENCE OUTWEIGHS THE PREJUDICIAL EFFECT OF SUCH EVIDENCE AND IS ADMISSIBLE UNDER RULE 403.

14. Under Rule 404(b), evidence of Rivera's planned escape from prison in relation to the federal charges pending against him as well as the evidence of Rivera and Ramirez-Guardado's attempts to threaten witnesses and influence testimony pass a Rule 403 balancing test. United States v. Young, 129 F.3d 663, 678 (4th Cir. 1997). The evidence would be excluded only if "its probative value is substantially outweighed by the danger of unfair prejudice." United States v. Sanders, 964 F.2d 295, 299 (4th Cir. 1992); see also Huddleson v. United States, 485 U.S. 681, 686 (1988). The Fourth Circuit has made it clear that the balance should be struck in favor of admission when the evidence is "relevant to an issue...necessary in the sense that it is probative of an essential claim or an element of the offense...[the evidence] is reliable...and the [evidence is] is probative." United States v. Hill, 322 F.3d 301, 309 (4th Cir 2003)(See also United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997). Even if there were some residual prejudice inherent in a Rule 404 (b) proffer, it pales in significance to the legitimate evidentiary use. Furthermore the Fourth Circuit has recognized that "undue prejudice would seem to require exclusion **only** in those instances where the trial judge believes there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and

¹⁰The government will separately address the waiver of the Sixth Amendment confrontation clause where a defendant causes the death of a government witness prior to trial. The public policy considerations are the same and the education of these defendants might protect other witnesses in this case.

that this risk is disproportionate to the probative value of the offered evidence.” United States v. Masters, 622 F.2d 83, 87 (4th Cir. 1980)(emphasis added).

15. The evidence of Rivera’s planned escape readily passes a 403 balancing test because the probative value of the evidence substantially outweighs any prejudicial effect the evidence might have. In Bartelho the court found no abuse of judicial discretion in allowing the defendant’s escape attempt to be admitted under 403 even though there was “plain references to procuring guns and likelihood of violence” that may have some prejudicial effects. 129 F. 3d 663, 678 (4th Cir. 1997). The court in United States v. Jones found no error in admitting evidence of defendant’s escape attempt while awaiting trial on armed robbery charges. United States v. Jones, 238 F. 3d 416 (4th Cir. 2000)(unpublished)(attached as Attachment D). The evidence of Rivera’s planned escape attempt is similar to the planned escape attempt in Bartelho in that both plans contain references to violence, references that may have some incidental prejudicial effects. However, any prejudicial effects Rivera’s plan may have due to the contents of the plan are outweighed by the probative value of the mere presence of the plan itself. The fact that Rivera was so concerned about the federal charges against him that he planned repeated escapes from jail is probative of his guilty conscience. United States v. VanMetre, 150 F.3d 339, 352 (4th Cir. 1998) (a consciousness of guilt “may be inferred the fact itself of the causes lack of truth”). Thus the highly probative nature of Rivera’s escape plans outweighs any possible prejudicial effect that such evidence may present and as such should pass a Rule 403 balancing test.

16. The evidence of Rivera and Ramirez-Guardado’s effort to facilitate false testimony and intimidate witnesses also passes a Rule 403 balancing test because the probative value of the evidence outweighs any prejudicial effect the evidence might have. In Hayden the court found that the

telephone conversation in which the defendant threatened a witness and the foul language in the letters in which the defendant threatened a witness did have prejudicial effects. United States v. Hayden, 85 F.3d 153, 159 (4th Cir. 1996). However, the court ruled that these prejudicial effects were outweighed by the probative value of the threats themselves because “the threats went directly to establish criminal intent and guilty consciousness.” Id. Much like Hayden, any prejudicial effect that the evidence of witness intimidation by Rivera and Ramirez-Guardado may have, either through their language or graphic depictions, is outweighed by the probative value of the evidence that goes directly to establishing “criminal intent and guilty conscience.” Id. Thus the highly probative nature of the evidence of Rivera and Ramirez-Guardado’s witness intimidation, pointing directly to criminal intent and a consciousness of guilt, outweighs any prejudicial effect that the evidence might have.

17. Even where Rule 404 (b) evidence carried greater emotional force than the evidence of the charged conduct itself, other courts have held such evidence to be very far from a “danger of unfair prejudice” that “substantially outweigh[s]” the probative value of the Rule 404 (b) evidence. United States v. Gartmon, 146 F.3d 1015 (D.C. Cir. 1998). In Gartmon, the defendant was charged with financial crimes, specifically, money laundering and interstate transport of fraudulently-obtained securities. The court admitted evidence that, when a female confederate tried to withdraw from the scheme, the defendant placed a gun in her vagina and told her she would listen to and do everything he told her; the court also admitted audio recordings of the defendant’s profane and abusive conversations with that same confederate. In affirming the trial court’s rulings, the District of Columbia Circuit wrote:

. . . Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally

require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone. . . It does not bar powerful, or even "prejudicial" evidence. Instead, the Rule focuses on the "danger of unfair prejudice," and gives the court discretion to exclude evidence only if that danger "substantially outweigh[s]" the evidence's probative value.

. . .

. . . Although there may have been some risk that a recitation of the facts of the incident would evoke emotions in the courtroom, that risk was comparatively small, and it alone did not render the testimony "unfair" or "substantially outweigh[]" its probative value. . . "[T]he balance [under Rule 403] should generally be struck in favor of admission when the evidence indicates a close relationship to the event charged."

146 F.3d at 1021 (citations omitted) (emphasis in original). See also United States v. Haney, 914 F.2d 602, 607 (4th Cir. 1990) ("True [the Rule 404 (b) evidence] was prejudicial to the defendants in the sense that it bolstered the prosecution's case, but under that definition, all incriminating evidence is prejudicial. The primary impact of the evidence was to demonstrate a string of robberies committed in the same manner and that type of evidence was certainly proper.") A fortiori, the risks, if any, of unfair prejudice in the proffered Rule 404 (b) evidence fall far short of substantially outweighing its legitimate, probative value. All relevant evidence presented by the government is intended to be prejudicial to the defendant. Rule 403 is concerned only with unfairly prejudicial information. Bennafeld, 287 F.3d at 324; Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1134 (4th Cir. 1988) ("All relevant evidence is 'prejudicial' in the sense that it may prejudice the party against whom it is admitted. Rule 403, however, is concerned only with 'unfair' prejudice. That is, the possibility that the evidence will excite the jury to make a decision on the basis of a factor unrelated to the issues properly before it.").

Conclusion

WHEREFORE, the government respectfully submits that the proffered Rule 404(b) evidence should be ruled admissible in the government's case-in-chief.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the 15th day of August, 2003, a copy of the Government's Rule 404(b) Notice was e-mailed without attachments and mailed with attachments

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